(1)

NO. 90-1348

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

BRIAN L. SMITH,

Petitioner

versus

TOWN OF EATON, INDIANA,
TOWN BOARD OF EATON & ITS MEMBERS,
RONALD HAGGARD, as board member and
individually, DAVID WILLIAMS, as board
member and individually, ANDY
CAVANAUGH, as board member and
individually, CHARLES HICKS, as board
member and individually, DON MITCHELL,
as board member and individually,
JIMMIE VANCE, as Town Marshall and
individually, and Does 1 thru 5.

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the Seventh Circuit Court of Appeals clearly erred in its finding of fact that the Petitioner had meaningful notice of the pre-deprivation hearing when:

a. the District Court's finding of facts do not mention notice;

b. the Court of Appeals relies on the garbled ramblings of the Petitioners brief, which were nearly so incomprehensible as to warrant the outright dismissal of the appeal; and

c. even though the exhibits clearly and conclusively show that the Petitioner could not possibly have been given more than twelve hours notice of the pre-deprivation hearing.

2. Whether a statute which requires no hearing before a tenured police officer with a statutory property and liberty interest in his job is suspended for 10 days violates the due process clause of the United States Constitution.

3. Whether twelve hours notice of a meeting to terminate a tenured policeman's employment satisfied the

Constitutional requirement of a meaningful pre-deprivation hearing?

LIST OF PARTIES

The following individuals and entities were parties to the proceedings in the Court of Appeals for the Seventh Circuit:

NO. 90-2563

Plaintiff-Appellant: BRIAN L. SMITH

Defendants-Appellees:

TOWN OF EATON, INDIANA, TOWN BOARD OF EATON & ITS MEMBERS, RONALD HAGGARD, as board member and individually, DAVID WILLIAMS, as board member and individually, ANDY CAVANAUGH, as board member and individually, CHARLES HICKS, as board member and individually, DON MITCHELL, as board member and individually, JIMMIE VANCE, as Town Marshall and individually, and Does 1 thru 5.

TABLE OF CONTENTS

Page:

Questions Presented For Review..... i

List of Parties.....iii

Table of Authorities..... iv

Opinions Below..... 2

Jursidiction..... 3

Statute Involved..... 4

Statement of the Case..... 9

Reasons for Allowance of the Writ... 24

Conclusion..... 37

TABLE OF AUTHORITIES

Cases Page:

Board of Regents v. Roth, 408 U.S. 564 (1972).....33

Cleveland Board of Education v Loudermill, 470 U.S. 532 (1985).....11 .....13, 29, 30, 31, 33, 34

Fetner v. City of Roanoke, 813 F.2d 1183 (11th Cir. 1987).....29

Goldberg v. Kelly, 397 U.S. 254 (1970) 34

Goodman v. Lukens Steel Co., 482 U.S. 656 (1987).....26

Graven Manufacturing Co. v. Linde, 336 U.S. 271, (1949).....26

Hewitt v. Helms, 459 U.S. 460 (1983)..32

Kelly v. Smith, 746 F.2d 827 (1st Cir. 1985).....29

Mims v. Board of Education, 523 F.2d 711 (7th Cir.1975).....33

Mulane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).....33

Parozo v. Rhoads, 711 F. Supp. 941 (N.D. Ill 1989).....29

Parratt v. Taylor, 451 U.S. 527 (1981).....12, 13, 26

Perry v. Sindermann, 408 U.S. 593 (1972).....33

United States v. Doe, 465 U.S. 605 (1984).....26

Constitutional Provisions, Statutes, and Rules:

United States Constitution, amend. 14..... 8

42 U.S.C. § 1983 9

Ind. Code § 36-8-3-4.....5

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PETITION FOR A WRIT OF CERTIORARI
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The Petitioners respectfully petition this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in Smith v. Town Board of Eaton, et.al., No. 89-256 and as published at 910 F.2d 1469.

On August 21, 1990, the Seventh Circuit Court of Appeals affirmed the decision of the United States District Court for the Southern District of Indiana, granting summary judgment on behalf of the Respondents and denying the Petitioner's Motion for Summary Judgment based upon the suspension and eventual termination of the Petitioner as a police officer employed by the Respondents.

OPINIONS BELOW

The unpublished opinion of the

District Court issued on July 21, 1989, and can be found in the Appendix beginning at page A-10. The District Court for the Southern District of Indiana granted summary judgment in favor of the Respondents and denied the Petitioner's summary judgment motion.

The Seventh Circuit Court of Appeals held oral arguments in this matter on June 12, 1990. On August 21, 1990, the Court of Appeals affirmed the decision of the District Court in an opinion published at 910 F.2d 1469. A copy of that opinion has been included in the Appendix at page A-1.

JURISDICTION

The judgment of the Seventh Circuit Court of Appeals was entered on August 21, 1990. The Petitioner then filed a timely Petition for Rehearing on

September 4, 1990. The Court of Appeals denied the Petition for Rehearing on October 17, 1990.

This Court has jurisdiction to review the judgment under the authority of 28. U.S.C. § 1254. This petition is timely filed in that it is filed before the expiration of the ninety (90) day period allowed by Rule 13.

Jurisdiction in the Federal District Court was obtained under 28 U.S.C. § 1332 when the Petitioner filed a Complaint pursuant to 42 U.S.C. § 1983.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED,

The initial statute involved in this case governs the procedure for disciplining and terminating police officers in the State of Indiana IND.

CODE § 36-8-3-4 (Wests, 1985). It provides in pertinent part:

> **Disciplinary powers of safety boards in cities, towns and townships.**--(a) This section also applies to all towns and townships that have full-time, paid police or fire departments. For purposes of this section, the appropriate appointing authority of a town or township is considered the safety board of a town or township.
>
> * * *
>
> (b)Except as provided in subsection (m), a member of the police or fire department holds office or grade until he is dismissed or demoted by the safety board. A member may be disciplined by demotion, dismissal, reprimand, forfeiture, or suspension upon either:
>
> * * *
>
> (2) A finding and decision of the safety board that the member has been or is guilty of any one [1] or more of the following:
>
> (A) Neglect of duty.
>
> (B) A violation of rules.
>
> (C) Neglect or disobedience of orders.
>
> (E) Immoral conduct.
>
> (G) Conduct injurious to the public peace or welfare.
>
> (H) Conduct unbecoming an officer.

> (I) Another breach of discipline.
>
> * * *
>
> (c) Before a member of a police or fire department may be suspended in excess of ten [10] days, [now five (5) days as amended in 1989] demoted, or dismissed, the safety board shall offer the member an opportunity for a hearing, if demanded. Written notice shall be given either by service upon the member in person or by a copy left at his last and usual place of residence. The notice must state:
>
> (1) The time and place of the hearing;
>
> (2) The charges against the member;
>
> (3) The specific conduct that comprises the charges;
>
> (4) That the member is entitled to be represented by counsel;
>
> (5) That the member is entitled to call and cross-examine witnesses;
>
> (6) That the member is entitled to have subpoenas issued, served, and executed in the county where the unit is located[.]
>
> * * *
>
> (e) The reasons for the suspension, demotion, or dismissal of a member of the police or fire department shall be entered as specific findings of fact upon the

records of the safety board. A member who is suspended for a period exceeding ten [10] days, [now five] demoted, or dismissed may appeal the decision to the circuit or superior court of the county in which the unit is located. However, a member may not appeal any other decision.

(f) An appeal under subsection (e) must be taken by filing in court, within thirty [30] days after the date the decision is rendered, a verified complaint stating in concise manner the general nature of the charges against the member, the decision of the safety board, and a demand for the relief asserted by him.

* * *

(h) A decision of the safety board is considered prima facie correct, and the burden of proof is on the party appealing. All appeals shall be tried by the court. The appeal shall be heard de novo only upon any new issues related to the charges upon which the decision of the safety board was made. The charges are considered to be denied by the accused person.

The Petitioner also alleges that the Respondents failed to follow the above-cited statutory provisions

requiring pre-deprivation notice of the date and time of the hearing, and notice of the charges against. Because the above statute confers upon a police officer a property and liberty interest in retaining his employment, the outlined procedures implicate the due process clause of the Fourteenth Amendment to the United States Constitution which operates to protect this interest from deprivation without due process. The Fourteenth Amendment provides as follows in relevant part:

> . . . [N]or shall any state deprive any person of life, liberty, or property, without due process of law[.]

Thus, 42 U.S.C. § 1983 is applicable because the Petitioner alleged in his Complaint that the Respondents deprived him of liberty and property without due process of law. The Civil Rights statute, 42 U.S.C. §

1983, states in pertinent part as follows:

> **Civil action for deprivation of rights**
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, to any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Proceedings Below

It is essential to this Petition for Certiorari that the proceedings at the District Court and Appellate levels be explained in order to expose the glaring defects in the findings of fact of the District Court and those of the

Court of Appeals.

This litigation was commenced with the filing of an action pursuant to 42 U.S.C. § 1983. The Petitioner, Mr. Smith, alleged that the Respondents suspended him from work without pay for two ten-day periods, made him work without pay for two months' worth of weekends, and ultimately discharged him on May 5, 1988. The Petitioner did not seek judicial review of the suspensions, the order to work without pay, or of his dismissal. Instead, the Petitioner filed this action upon being terminated.

Both the Petitioner and the Respondents filed motions for summary judgment. The District Court had before it affidavits submitted by several individuals on behalf of the Petitioner, responses to the Petitioner's Interrogatories and Request for

Production, and minutes of meetings held by the Respondents, the Board of Trustees for the Town of Eaton, Indiana.

The Petitioner argued that the Respondents failed to give him notice before any hearing, except the December 29, 1987 hearing. Also, the Petitioner argued that the hearings were not "meaningful" because of the failure to provide prior notice and the denial of a substantial opportunity to respond to charges against him, which were contrary to this Court's opinion in Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985).

The Respondents offered no evidence of oral or written notice of the hearings on December 12, 1987 which resulted in the order requiring the Petitioner to work without pay on his days off, on the February 13, 1988

hearing which resulted in the decision to suspend the Petitioner for ten days, or on the hearing on May 5, 1988 which ultimately ended in the Petitioner's termination. Instead, the Respondents argued that Parratt v. Taylor, 451 U.S. 527 (1981), controlled, and that any inquiry into pre-deprivation notice and meaningful hearing was irrelevant given the availability of a statutory post-deprivation remedy in the form of judicial review of the administrative decision.

The District Court agreed with the Respondents and found Parratt controlling. Herein lies the crux of the dilemma.

Consistent with this Court's rationale in Parratt, the District Court made no findings of facts and

conclusions of law which did not even speak of notice except for the December 29, 1987 hearing.

Actually, the District Court merely signed the Respondents' proposed finding of facts and conclusions of law. The findings of fact are reproduced in their entirety in the Appendix at page A-10.

On appeal, the Court of Appeals found that Loudermill, not Parratt, controlled the Court's analysis of the issues. After noting that this Court's decision in Loudermill held that due process mandates a meaningful pre-deprivation hearing where practicable, the Court of Appeals held that the District Court's findings of facts were insufficient to dispose of the issues presented on appeal. Thus, the Court of Appeals was forced to scour the arguments of counsel and the record

for evidence of notice. The United States Court of Appeals was faced with a "particularly difficult situation." Appendix p. A-3, 910 F.2d 1469, 1471.

Unfortunately for the Petitioner and the Court of Appeals, the briefs filed by Petitioner's Appellate counsel were ". . . rambling, almost totally incomprehensible in its treating of the issues and legal principles." Appendix, page A-2, 910 F.2d 1469, 1470. The Court of Appeals further stated "[t]he treatment of the factual background of the case is similarly lacking." Id. The Court of Appeals then defined the brief as "... a shallow, incoherent 'argument' that spans twenty-five pages." Id.

The Court of Appeals specifically held that the District Court found that the Petitioner had notice of the December 29th hearing, which resulted in

the January ten-day suspension. Appendix, p. A-5, 910 F2d at 1472. The District Court took the effort to overtly and specifically find that such notice occurred, stating:

> 3. That sometime in December of 1987 the plaintiff received notification by the Town Marshal of Eaton of a ten (10) day suspension hearing to be held on December 29, 1987. Said hearing was conducted by the Town Board of Eaton, whereby the plaintiff was suspended for conduct unbecoming an officer for the ten (10) day period January 15, 1988, to January 29, 1988, pursuant to Ind. Code § 36-8-3-4(b) and (c).

On the contrary, the District Court made so such specific findings with respect to notice of other hearings. The finding of fact regarding the May 5 termination stated:

> 7. On May 5, 1988, in a special session of the Town Board of Eaton, the plaintiff was dismissed from his duties as a full-time police officer for the Town of Eaton for conduct unbecoming an officer, pursuant to Ind. Code § 34-8-3-4.

It is a mystery how the Court of Appeals could have made the blanket statement that "[t]he District Court found that Mr. Smith [the Petitioner] received notice and a hearing prior to . . . his dismissal in May." It is a clearly erroneous, unsupported finding of a material, essential fact whether there was adequate pre-deprivation notice.

In its decision the Court of Appeals found that Mr. Smith received notice prior to the February suspension, The Court of Appeals even noted that the District Court made no specific finding of fact regarding whether the Respondents gave the Petitioner notice of the February hearing. However, the Court of Appeals' finding as to the May

5 notice and as to the February notice are equally unsupported by anything in the District Court's findings, or by anything in the record. Despite this lack of factual support, the Court of Appeals found that the Loudermill pre-deprivation due process requirement was met, and that the Petitioner received adequate notice and meaningful disciplinary hearings. The United States Court of Appeals for the Seventh Circuit then affirmed the District Court's entry of summary judgment in favor of the Respondents and denied the Petitioner's cross-motion for summary judgment. Appendix, p. A-1.

STATEMENT OF THE FACTS

The Petitioner, Brian L. Smith, was employed as a police officer by the Town

of Eaton Police Department from June 1986 until he was dismissed by the Town of Eaton Board of Trustees (the Respondents) on May 5, 1988. Indiana Law granted Mr. Smith a property interest in his continued employment because the statutes stated that he could be dismissed only for just cause. IND. CODE § 36-8-3-4.

On December 18, 1987 the Petitioner received a letter from the town Marshal, Jimmie Vance, stating that several members of the Eaton Town Board had met and decided that the Petitioner was guilty of conduct unbecoming an officer. The marshal also stated that as a result, the Petitioner was required to forfeit all of his days off during January and February of 1988. Apparently this action forced the Petitioner to work several shifts

without pay on his scheduled days off work. Appendix, p. A-28.

Sometime in December of 1987 Mr. Smith received notice of a suspension hearing to be held during an executive session on December 29, 1987. Mr. Smith attended the hearing. The Respondents provided written statement of the charges to Mr. Smith before the executive session. During the executive session, the Town Board voted to suspend Mr. Smith for 10 days in January without pay.

Three months before the Respondents dismissed the Petitioner, David Williams, a member of the Town of Eaton Board of Trustees as well as the Police Commissioner of Eaton, asked Mr. David L. Withers if he would be interested in working for the Eaton Police

Department. Appendix, p. A-34. When Mr. Withers asked who was leaving the Eaton Police Department, David Williams replied that the Board was "going to get rid of Brian Smith." Id. Mr. Withers also stated that Williams had just consulted with other members of the Town Board and the town Marshal immediately before offering the job to Mr. Withers. Id.

On February 13, 1988 the Respondents met in a "special session," ostensibly to discuss town nuisance ordinances. During this special session, the Board also discussed suspending Mr. Smith. One board member, John Penrod, refused to vote, stating that Mr. Smith should be called in for a hearing before he was suspended. Despite this protest, the Respondents voted to suspend Mr. Smith for 10 days

without pay beginning February 19, 1988 stating that "[t]his is to be a final step prior to dismissal." Mr. Smith was informed of the suspension by an undated letter received after the action was taken against him in his absence. Mr. Smith was not at that special session.

During a regular meeting of the Town Board of Trustees on February 24, 1988, the Board voted to retroactively suspend Mr. Smith effective February 18, 1988. Again, Board member John Penrod abstained from voting. The Board noted that the February 13, 1988 hearing had been held for a special purpose involving the planning commission. The minutes reveal no mention that Mr. Smith was notified of either the action taken against him at the February 13 special session or the retroactive suspension

hearing or any discussion or hearing on the charges against Mr. Smith. In fact, one of the board members stated that "according to State Law a suspension up to and including ten days can be given without a hearing with the officer." Mr. Smith was not present at the February 24, 1988 regular session.

On May 2, 1988 Phyllis Cantor, a recent contributor to the Police Discretionary Fund, lodged a complaint against Mr. Smith with the Town of Eaton. At a special session of the Town of Eaton Board of Trustees on the evening of May 4, 1988, the board held a closed-door "executive session" to "discuss" the Cantor complaint. No report of the substance of the "executive session" was contained in the minutes of the Special Session of May 4.

Immediately following this evening

Special Session of May 4, 1988, the board members concurred in calling for an "Emergency Special Session" for 8:00 A.M. May 5, 1988. Appendix, p. A-27. That evening, the town board called and placed notice of the Emergency Special Session in the newspapers. Id.

The minutes of the May 5, 1988 Emergency Special Session show that Brian Smith was present. Appendix, A-31. There is no record that Mr. Smith received notice of the May 5, 1988 morning Emergency Special Hearing, or notice of the charges against him which ultimately resulted in his dismissal from employment. At the Emergency Special Meeting, the Board "discussed" the complaint by Cantor. The Board then voted to dismiss Mr. Smith and ordered him to turn in his police badge and weapon.

On May 10, 1988 at another Town Board Special Session, the Board made the following statements in response to questions by another Eaton Police officer who was concerned about civil rights and whether Mr. Smith knew the reasons why he was terminated:

> he has a right within thirty (30) days . . . he has thirty (30) days if he wishes for a hearing to file to let us know he wants that and in thirty (30) he'll have that hearing and he wishes that we're obligated to . . . its one of his rights, that's what he likes [David Williams, Town Board Member]

1. Whether the Seventh Circuit Court of Appeals clearly erred in its finding of fact that the Petitioner had meaningful notice of the pre-deprivation hearing.

Only finding of fact number three [3] even mentions prehearing notification only of the time and date of a hearing. Appendix, p. A-13.

Conversely, findings of fact numbers five and seven speak of the Respondents holding hearings on disciplinary charges against the Petitioner, and of the Respondents taking adverse action against the Petitioner. Appendix, p. 14-15. However, the District Court failed to find that the Respondents gave the Petitioner any pre-deprivation notice, either orally or written, as required by Indiana statute. IND. CODE § 36-8-3-4.

Finding of fact number 4 does not even hint that a hearing was held before the Petitioner was ordered to work all his days off during January and

February, 1988 without pay.

In order for this Court to examine the findings of fact made by a Court of Appeals, there must be an "obvious and exceptional" showing of error. Graven Manufacturing Co. v. Linde, 336 U.S. 271, 275 (1949); United States v. Doe, 465 U.S. 605 (1984); Goodman v. Lukens Steel Co., 482 U.S. 656, 665 (1987). Normally, as in the three cases cited above, most judgments represent concurrent findings of fact by two courts. Thus, this Court rightful is hesitant to examine even errors that are obvious in the record.

In this case the District Court made quite limited findings of fact geared solely toward its mistaken application of Parratt v. Taylor, supra, to the case at hand. Therefore, the Court of Appeals was forced to make

findings of "notice" of the pre-deprivation hearings (both suspension and termination hearings) in order to resolve the case. Appendix, p. A-5.

The Court of Appeals stated that "[t]he District Court found that Mr. Smith received notice and a hearing prior to his ten day suspension in January and his dismissal in May." Appendix, p. A-5. In reviewing finding of fact number 7 which concerns the January suspension (December 29, 1987 hearing) the District Court specifically found that notice was given.

No mention of notice or hearing regarding the December 12, 1987 order forcing Mr. Smith to work without pay appears in either the District Court's findings of fact or the Court of Appeals opinion. Somehow the question of the

legality of this forfeiture was totally forgotten and left unresolved.

The decision of the Court of Appeals is clearly erroneous when the facts and the record are organized and displayed for the court in a logical, coherent fashion. Unfortunately, the Petitioner, Mr. Smith, did not receive the benefit of such a brief at the appellate level. Neither the Petitioner's nor the Respondents' briefs pointed out the undisputed fact that the Respondents set the May 5, 1988 termination hearing the night before, only twelve hours before Mr. Smith's termination hearing. Appendix, p. A-27. Thus there is no possible way that the Petitioner could have been given more than 12 hours Notice, and most of the hours were not working hours.

The impact of this clear error is dispositive of this case. Moreover, the Court of Appeals' published decision then stands for the proposition that 12 hours notice is sufficient under Loudermill. Other Courts of Appeals have also held that less than 12 hours notice prior to a pre-deprivation hearing is constitutionally acceptable under Loudermill. Kelly v. Smith, 746 F.2d 1412 (11th Cir. 1985); Brasslett v. Cota, 761 F.2d 827 (1st Cir. 1985); Parozo v. Rhoads, 711 F. Supp. 941 (N.D. Ill 1989).

In direct conflict with these decisions is Fetner v. City of Roanoke, 813 F.2d 1183 (11th Cir. 1987). In Fetner the Court of Appeals held that a phone call giving 30 minutes notice of a termination hearing is insufficient. Id. at 1184. Thus, there is a dispute

among the circuits as to the requirements of Loudermill, which is the subject of the second issue, below.

2. Whether a statute which requires no hearing before a tenured police officer with a statutory property and liberty interest in his job is suspended for 10 days violates the due process clause of the United States Constitution.

3. Whether twelve hours notice of a meeting to terminate a tenured policeman's employment satisfied the Constitutional requirement of a meaningful pre-deprivation hearing?

The Court of Appeals stated that because the Petitioner had "notice" of the hearing, was present at two of the

hearings and was not prevented from speaking, the Respondents satisfied the requirement of providing a meaningful pre-deprivation hearing. Appendix, p. A-6. Also, as shown above by indisputable fact, the Petition could only have had 12 hours notice of the May 5, 1988 termination hearing.

In Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), this Court stated the rule that due process mandates that a meaningful hearing must be held before a person is deprived of the substantive rights of life, liberty or property. Loudermill, at 541. The Court expressly states "[a]n essential principle of due process is that a deprivation of life, liberty or property be preceded by notice and opportunity for hearing appropriate to the nature of the case." Id. at 542

(emphasis added), citing Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 316 (1950). This Court further reemphasized that the hearing must occur before the deprivation. Id.

As the Court of Appeals correctly stated, there is no question that the Petitioner possessed a property interest in his job with the Eaton Police Department, due to the statutory requirement that he could only be fired for just cause. Appendix, p. A-4. Therefore, his termination was a deprivation of property. Hewitt v. Helms, 459 U.S. 460 (1983) (property interest defined by mandatory language in state statute which limits official discretion).

In addition, the Court of Appeals failed to inquire about or rule on the

deprivation of Petitioner's "liberty interest" as encompassed by his employment. As this Court also pointed out in Loudermill, a fired worker such as the Petitioner may encounter difficulties in finding new employment due to the burden of the questionable circumstances under which he left his previous job. Loudermill, 470 U.S. 532, 543. A worker is also deprived of his liberty when his good name, reputation, honor or integrity is at stake because of what government officials are doing to him. Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972). Suspensions, lay-offs, and other discipline can even result in a deprivation of a worker's liberty interests. Mims v. Board of Education, 523 F.2d 711 (7th Cir. 1975),

Davis v. Barr, 373 F. Supp. 740 (E.D. Tenn. 1973), Ruhlman v. Barger, 435 F. Supp. 447 (W.D. Pa. 1976), Bagby v. Beal, 439 F. Supp. 1257 (M.D. Pa. 1977).

The clear policy behind the Constitutional requirement of pre-deprivation notice is to reduce the possibility of an erroneous termination Loudermill, 470 U.S. 532, 543; Mathews v. Eldridge, 424 U.S. 319, 355 (1976); see also Goldberg v. Kelly, 397 U.S. 254, 267 (1970) (right to pre-deprivation hearing concerning welfare benefits). This reason underlying this policy is borne out by this case.

In the case at hand, at the only meaningful pre-deprivation hearing - the one held on December 29, 1990 - the Petitioner was able to expose as false one of the two complaints against him.

As a result, The Respondents only suspended the Petitioner for the one violation that he openly admitted. The Petitioner had at least ten days notice of the December 29, 1987 hearing. The same notice was completely absent with respect to the other hearing.

At no point did the Court of Appeals address the type of notice, the content of the notice, the number of days the notice was given to the Petitioner prior to each hearing, or the substance of each hearing. Appendix, p. A-6. Again, in reference to the quality of the Petitioner's appellant brief, Mr. Smith concludes that he was "not able to defend himself" at any of the hearings. The Court of Appeals, by its decision, clearly gave no weight to the obvious implications of the Petitioner's assertions that he was

denied a meaningful hearing in each of three instances.

CONCLUSION

For the above reasons, the writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner
Brian L. Smith

January 14, 1990

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 89-2563

BRIAN L. SMITH,

Plaintiff-Appellant,

v.

TOWN OF EATON, INDIANA, TOWN BOARD OF EATON AND ITS MEMBERS, RONALD HAGGARD, as board member and individually, GALE PITMAN, as board member and individually, DAVID WILLIAMS, as board member and individually, ANDY CAVANAUGH, as board member and individually, CHARLES HICKS, as board member and individually, DON MITCHELL, as board member and individually, JIMMIE VANCE, as Town Marshall and individually, and DOES 1 thru 5,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division.
No. 88 C 531—**Sarah E. Barker**, *Judge.*

ARGUED JUNE 11, 1990—DECIDED AUGUST 21, 1990

Before CUDAHY, FLAUM, and RIPPLE, *Circuit Judges.*

RIPPLE, *Circuit Judge.* Brian Smith filed a complaint under 42 U.S.C. § 1983 on May 6, 1988, the day following his termination as a police officer for the Town of Eaton. Mr. Smith's complaint asserted that his dismissal

violated his constitutional right to procedural due process, substantive due process, and equal protection. The district court granted the defendants' motion for summary judgment, and Mr. Smith appealed. For the following reasons, we affirm the judgment of the district court.

I

We must begin with an observation fortunately not necessary in too many cases that come before us. The appellant's brief is rambling, almost totally incomprehensible in its treatment of the issues and legal principles. The treatment of the factual background of the case is similarly lacking. It is well established that it is the duty of attorneys preparing cases for this court to examine carefully the law and apply it in a cogent fashion to the facts of the case. Under Rule 28(a)(4) of the Federal Rules of Appellate Procedure, counsel is required to present a brief that contains "the contentions of the appellant with respect to the issues presented, and the reasons therefor." We have noted that this rule requires counsel to present its arguments in a professional manner. *John v. Barron*, 897 F.2d 1387, 1393-94 (7th Cir. 1990). Unprofessional presentation of arguments not only is a disservice to this court, but also "is a disservice to other litigants," who must wait while this court is forced to undertake the extra duty of formulating counsel's arguments. *Bonds v. Coca-Cola Co.*, 806 F.2d 1324, 1328 (7th Cir. 1986). Especially now, when the court system is burdened to capacity, and when judicial resources are stretched to the very limit, our fiduciary duty to the institution we serve and to *all* the litigants who come before us requires that we be vigilant in enforcing the bar's responsibility to present issues clearly and comprehensively.[1]

[1] The duty that the bar owes to this court is mirrored by counsel's duty to represent clients competently. As stated by Rule 1.1 of the ABA Model Rules of Professional Conduct: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

This case presents a somewhat different problem from the cases in which we usually invoke Rule 28. Most of our cases have involved instances where counsel's submission is far too abbreviated and sketchy.[2] In those cases, we have stated repeatedly that this court cannot be called upon to supply the legal research and organization to flesh out a party's arguments. *See John*, 897 F.2d at 1393; *Zelazny v. Lyng*, 853 F.2d 540, 542 n.1 (7th Cir. 1988); *Beard v. Whitley County REMC*, 840 F.2d 405, 408-09 (7th Cir. 1988); *Bonds*, 806 F.2d at 1328; *Sanchez v. Miller*, 792 F.2d 694, 703 (7th Cir. 1986), *cert. denied*, 479 U.S. 1056 (1987). We see no functional difference between a brief containing a mere passing reference to a legal argument and one with a shallow, incoherent "argument" that spans twenty-five pages, the situation presented here. In both instances, the court is frustrated in performing its function of review and evaluation of the judgment before it.

Indeed, when the entire brief exhibits lack of attention, we are confronted with a particularly difficult situation. We recently have made it clear that we shall not hesitate to dismiss an appeal due to poorly prepared and researched briefs. *See John*, 897 F.2d at 1393 ("[W]e warned that one day the penalty for a perfunctory appeal could be dismissal of the appeal. That day has arrived.") (citation omitted); *cf. Spartacus, Inc. v. Borough of McKees Rocks*, 694 F.2d 947, 950 (3rd Cir. 1982) (Garth, J., dissenting) (dismissal of appeal appropriate when party does

[2] *See Bonds v. Coca-Cola Co.*, 806 F.2d 1324, 1328 (7th Cir. 1986) ("collateral allusions to a legal issue do not require the court to decide difficult questions"); *cf. United States v. White*, 879 F.2d 1509, 1513 (7th Cir. 1989) (argument raised in passing in a footnote deemed waived), *cert. denied*, 110 S. Ct. 1471 (1990); *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290, 291 n.1 (7th Cir.) (issue is waived due to party's failure to present substantive argument), *cert. denied*, 109 S. Ct. 308 (1988).

not present a court with complete brief).[3] This case comes close—very close—to meriting that sanction. However, because we can glean—albeit faintly—the basic facts and the general lines of argument from the briefs and record, we shall deal, as best we can under the circumstances, with what appear to be the basic contentions of the appellant.

II

Brian Smith had been employed as a police officer for the Town of Eaton since 1986. Beginning apparently in late 1987, Mr. Smith engaged in several activities that drew the attention of his supervisors and ultimately resulted in two suspensions of ten days each to be carried out in January and February, 1988. On May 5, 1988, the Town Board of Eaton met to investigate additional complaints against Mr. Smith. At that meeting the Board voted to dismiss Mr. Smith for conduct unbecoming a police officer, pursuant to Indiana Code § 36-8-3-4.

III

Mr. Smith alleges three constitutional violations to support his section 1983 claim. First, he argues that he was denied procedural due process. A due process claim (procedural or substantive) must be based on a violation of a protected liberty or property interest. *Bishop v. Wood*, 426 U.S. 341, 343 (1976). On the record before us, we see no reason to question that Mr. Smith had a property interest in his employment that was implicated by the ten

[3] Other federal appellate courts have recognized that dismissal as a sanction for poorly presenting a case on appeal is a necessary and salutary measure. *See* Annotation, *Sanctions, in Federal Circuit Courts of Appeals, for Failure to Comply with Rules Relating to Contents of Briefs and Appendixes*, 55 A.L.R. Fed. 521, 526-27 (1981) (collecting cases).

day suspensions and his ultimate dismissal.[4] However, his claim cannot succeed if the procedures he received were constitutionally adequate. The Supreme Court has established that an employee possessing a property interest in his job must be given notice and an opportunity to be heard prior to discipline. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 547 (1985) (dismissal); *see also Garraghty v. Jordan*, 830 F.2d 1295, 1299-1300 (4th Cir. 1987) (applying *Loudermill* to five day suspension); *Pesce v. J. Sterling Morton High School*, 830 F.2d 789, 793 (7th Cir. 1987) (same); *cf. Goss v. Lopez*, 419 U.S. 565, 581 (1975) (requiring notice and opportunity to be heard before student may be suspended). The Supreme Court has made clear that this procedure need not be elaborate and can be satisfied with less than a full evidentiary hearing. *Loudermill*, 470 U.S. at 545.

The district court found that Mr. Smith received notice and a hearing prior to his ten day suspension in January and his dismissal in May. Mr. Smith has presented no argument that would allow us to call this determination

[4] Indiana Code § 36-8-3-4(b) permits suspension or dismissal of a police officer, but only upon the occurrence of several enumerated reasons. This court has interpreted a predecessor statute of section 36-8-3-4 to provide a property interest. *Parrett v. City of Connersville, Ind.*, 737 F.2d 690, 694 (7th Cir. 1984) (in the context of a dismissal), *cert. dismissed*, 469 U.S. 1145 (1985). An Indiana court came to the opposite conclusion when it interpreted the predecessor statute. *Dunlap v. Cross*, 403 N.E.2d 885, 887-88 (Ind. Ct. App. 1980). It appears that the *Dunlap* court placed great emphasis on the lack of appellate recourse in the statute for a suspension of less than 10 days. But as the Supreme Court has made clear, state procedures do not in themselves decide the question of whether a property interest has been created. *Olim v. Wakinekona*, 461 U.S. 238, 250-51 (1983); *Hewitt v. Helms*, 459 U.S. 460, 471 (1983). Because we treat Mr. Smith's suspensions, no matter what their length, as constituting the deprivation of a property interest, we need not concern ourselves with counsel's convoluted and at times incomprehensible time computations.

clearly erroneous.[5] The district court did not make a specific finding that Mr. Smith received notice before his ten day suspension in February, but Mr. Smith admits in his brief that he received notice. Appellant's Br. at 7. We conclude, therefore, that Mr. Smith received adequate procedure to satisfy the constitutional requirements of notice and an opportunity to be heard.

Mr. Smith's other two constitutional arguments border on the frivolous and will be discussed only briefly. Mr. Smith asserts that the actions by the Town Board of Eaton violated his substantive due process rights. The board's actions of suspending and ultimately dismissing Mr. Smith are based on several problems related to Mr. Smith's work, including an altercation with another officer, failure to follow procedure, and a written complaint by a citizen regarding Mr. Smith's performance of his duties. R.18 Ex. 4; R.20 Exs. A & D; R.21 at 4. In the face of these incidents, Mr. Smith presents no argument nor alleges any facts that would support a finding that the board's action was arbitrary or capricious. We conclude, therefore, that Mr. Smith's substantive due process claim has no merit.

Mr. Smith's equal protection argument similarly is meritless. He claims that the town board had information regarding complaints against two other officers and did not suspend or dismiss them. Appellant's Br. at 15. An equal protection claim must be based on "intentional discrimination against [the plaintiff] because of his membership in a particular class, not merely [because] he was treated unfairly as an individual." *Huebschen v. Department of Health and Social Servs.*, 716 F.2d 1167, 1171 (7th Cir. 1983); *see also Gray v. Lacke*, 885 F.2d 399, 414 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 1476 (1990). Mr. Smith does not allege such class-based discrimination, and therefore this claim also fails.

[5] In conclusory fashion, Mr. Smith asserted in his brief to this court that he was "not able to defend himself prior to any of the numerous disciplinary actions and ultimately his termination." Appellant's Br. at 16. The minutes from the town board's May 5 executive session in which Mr. Smith was formally discharged indicate that Mr. Smith was present. R.18 Ex. 4. In addition, Mr. Smith admits in an affidavit that he was present at the executive session on December 29, 1987 at which his first 10 day suspension was discussed, R.21 at 5, and the minutes of that meeting indicate that Mr. Smith participated by asking questions. R.21 Ex. 1. While mere presence is not enough to satisfy the requirement that an employee be given an opportunity to be heard prior to an action that infringes a property interest, Mr. Smith never has contended that he was prevented from speaking at the meetings.

IV

Having disposed of the substantive issues before us, we now turn to the matter of sanctions. We must conclude that appellant's counsel's performance in this appeal has been substandard. We have been impeded in our review of the case and valuable time has been lost. We first admonish counsel that such performance is not to be repeated. Any such repetition may well result in suspension from practice before this court. Second, we fine counsel five hundred dollars ($500), payable within thirty days to the clerk of this court by certified check made payable to the Treasurer of the United States. This fine is imposed both as a deterrent and to compensate the government, at least in part, for the inordinate expenditure of time required. *See Westinghouse Elec. Corp. v. NLRB*, 809 F.2d 419, 425 (7th Cir. 1987) (counsel fined $1,000 for filing excessively lengthy brief and "correcting" the error by changing the format; this action required the panel to read two sets of briefs); *Farguson v. MBank Houston, N.A.*, 808 F.2d 358, 360 (5th Cir. 1986) ($500 sanction payable to clerk imposed *sua sponte*); *Van Sickle v. Holloway*, 791 F.2d 1431, 1437 (10th Cir. 1986) (fine of $1,500 imposed as sanction "to regulate the docket, promote judicial efficiency, and most importantly in this case, to deter frivolous filings"). This fine is not to be paid by—or passed on to—the appellant. It is imposed on counsel alone.

Conclusion

Accordingly, the judgment of the district court is affirmed. The appellee may recover the usual costs. Sanctions against the appellant's attorney are imposed.

AFFIRMED WITH SANCTIONS

CUDAHY, *Circuit Judge*, concurring:

This is a troubling case, first, because of the plaintiff's garbled argument, which the majority describes, and second, because the defendants rely primarily on the availability of state appellate procedures to satisfy the requirements of due process. The district court accorded some weight to the defendants' position on this latter point. As the majority holds, *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), and numerous other authoritative cases require that for a public employee to be deprived of his property interest in his job, notice and a *pre*-deprivation hearing are required. State post-deprivation remedies do not suffice, and their availability is irrelevant here.

There may indeed be substantial reasons to remand the case to explore Smith's apparent claim of denial of notice and an opportunity for a hearing, but I find it difficult to disagree that Smith has failed adequately to explain the alleged absence of notice and of an opportunity for a hearing, which are presumably the gist of his complaint. Smith loses because of these deficiencies in the presentation of his case on appeal, not because state appellate remedies were available.

FLAUM, *Circuit Judge*, concurring.

I concur in the well-reasoned judgment of the Court on the merits of the case. While the majority opinion accurately reflects the inadequacies of the appellant's brief and the attendant frustrations involved in addressing such a work product, I would forego the public admonition and imposition of a pecuniary sanction in this case. Respectfully, if not regretfully, I have concluded that the papers and argument presented to this Court may well be the product of a current lack of capacity for the appellate craft rather than a formulated indifference to the standards required of counsel in this Court. I would simply urge that counsel seriously ponder further personal preparation and possibly the obtaining of outside professional assistance before attempting to sail again on the Seventh Circuit seas.

Furthermore, since this particular unsatisfactory performance is somewhat unique and not representative of the general level of legal competence displayed before this Court, a non-published admonishment, in my view, would have sufficed.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BRIAN L. SMITH, Plaintiff	)	
vs.	)	CAUSE NO. IP88-531C
TOWN OF EATON, INDIANA TOWN BOARD OF EATON, INDIANA, AND ITS MEMBERS; RONALD HAGGARD AS BOARD MEMBER AND INDIVIDUALLY; DAVID WILLIAMS AS BOARD MEMBER AND INDIVIDUALLY; CHARLES HICKS AS BOARD MEMBER AND INDIVIDUALLY; DON MITCHELL AS BOARD MEMBER AND INDIVIDUALLY; JIMMY VANCE AS TOWN MARSHALL AND INDIVIDUALLY; AND DOES 1 THROUGH 5, Defendants	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court, having heard oral argument by the parties and having

considered the motion for summary judgment and supporting and opposing briefs now enters the following findings of fact and conclusions of law:

Findings of Fact

1. That the defendant, Town of Eaton, Indiana, is a governmental unit organized under the constitution of the state of Indiana.

2. That at all times relevant to this action, the plaintiff, Brian L. Smith, was a full-time member of the Town of Eaton Police Department.

3. That sometime in December of 1987 the plaintiff received notification by the Town Marshal of Eaton of a ten (10) day suspension hearing to be held

on December 29, 1987. Said hearing was conducted by the Town Board of Eaton, whereby the plaintiff was suspended for conduct unbecoming an officer for the ten (10) day period January 15, 1988, to January 29, 1988, pursuant to Ind. Code § 36-8-3-4(b) and (c).

4. That on or about December 18, 1987, the Town Marshal of Eaton notified the plaintiff that additional disciplinary action for conduct unbecoming an officer had been taken resulting in a forfeiture of all days off during the months of January and February, 1988.

5. The plaintiff was, following a hearing on February 24, 1988, again suspended by the Town Marshal of Eaton for conduct unbecoming an officer for

ten (10) days. The suspension, approved retroactively by the Town Board of Eaton, was effective for the period February 19, 1988, to March 4, 1988, pursuant to Ind. Code § 34-8-3-4(b) and (c).

6. Each of the above referenced suspensions were for periods not in excess of ten (10) days. No statutory, practicable right or entitlement to certain days off work was established.

7. On May 5, 1988, in a special session of the Town Board of Eaton, the plaintiff was dismissed from his duties as a full-time police officer for the Town of Eaton for conduct unbecoming an officer, pursuant to Ind. Code § 34-8-3-4. 8. The following day, May 6, 1988, plaintiff filed this

42 U.S.C. § 1983 action.

9. On or about May 14, 1988, after the plaintiff had filed his section 1983 action in this court, the plaintiff, by certified mail, demanded a hearing before the Town Board of Eaton to review the decision to dismiss him.

10. The plaintiff did not appeal his dismissal within thirty (30) days to the circuit or superior court of the county in which the governmental unit is located, as required by Ind. Code § 36-8-3-4(e).

11. During the hearing on the defendant's motion for summary judgment held on June 21, 1989, counsel for plaintiff stipulated that the plaintiff is asserting no pendant state tort

claims against the defendants.

12. The plaintiff's counsel further stipulated, and the court so finds, that no claims are asserted by the plaintiff attacking the appeals process, as provided in Ind. Code § 36-8-3-4, as procedurally inadequate.

13. Any conclusion of law stated below, to the extent that it constitutes a finding of fact is hereby incorporated by reference as an additional finding of fact by the court.

Conclusions of Law

1. Any finding of fact stated above, to the extent that it constitutes a conclusion of law is hereby incorporated by reference as an

additional conclusion of law by the court. 2. Pursuant to Ind. Code § 36-8-3-4(e), a full-time member of a police or fire department in the state of Indiana may only appeal a suspension exceeding ten (10) days in length.

3. The plaintiff has no constitutionally practicable property interest for a suspension for a period of ten (10) days or less.

4. A full-time member of a police or fire department in the state of Indiana may appeal a suspension for a period exceeding ten (10) days, a demotion or a dismissal, by filing an appeal in the superior or circuit court where the governmental unit is located, within thirty (30) days after the

suspension, demotion or dismissal has been rendered. Ind. Code § 36-8-3-4(e) and (f).

5. A suspension for a period exceeding ten (10) days, demotion or dismissal is final and conclusive upon all persons not appealing the decision within thirty (30) days as found in Ind. Code § 36-8-3-4 (f) and (g).

6. Due process requirements are satisfied if a state provides a suspended, demoted, or dismissed full-time member of a police or fire department a constitutionally sufficient appellate procedure, even if that member of a police or fire department merely declines or fails to take advantage of the appeal process available. Dusanek v. Hannon, 677 F.2d 538 (7th Cir. 1982)

7. A full-time member of a police or fire department is not required to exhaust his administrative remedies before filing a 42 U.S.C. § 1983 action in federal court, but a state cannot be held to have violated procedural due process requirements when it has made adequate procedural protections available and the plaintiff has simply refused to avail himself of them. Dusanek, 677 F.2d at 538; Parratt v. Taylor, 451 United States 527 (1981).

8. The plaintiff, having filed his complaint herein one day after his termination, failed to state any claim upon which this court can grant any relief.

9. The plaintiff, having stipulated that he asserts no pendant state tort claims in the complaint,

relieves the court from having to determine whether the plaintiff filed a timely and proper notice of tort claim with the Town of Eaton, as required by Ind. Code § 34-4-16-5-7.

10. There being no material facts in controversy, summary judgment may be ENTERED in defendant's favor.

It is so ORDERED this 21st day of July, 1989.

Sarah Evans Barker, Judge
United States District Court
Southern District of Indiana

Copies to:

Thomas D. Margolis, Esquire

409 West Washington St.

Muncie, Indiana 47305

David S. Wallace, Esquire

Todd Irwin Glass, Esquire

WARNER, WALLACE, McLAREN & DAGUE

400 East Jackson St.

Muncie, Indiana 47305

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BRIAN L. SMITH,	)	
	)	
Plaintiff	)	
	)	
vs.	)	CAUSE NO. IP88-531C
	)	
TOWN OF EATON, INDIANA TOWN BOARD OF EATON, INDIANA, AND ITS MEMBERS; RONALD HAGGARD AS BOARD MEMBER AND INDIVIDUALLY; DAVID WILLIAMS AS BOARD MEMBER AND INDIVIDUALLY; CHARLES HICKS AS BOARD MEMBER AND INDIVIDUALLY; DON MITCHELL AS BOARD MEMBER AND INDIVIDUALLY; JIMMY VANCE AS TOWN MARSHALL AND INDIVIDUALLY; AND DOES 1 THROUGH 5,	)	
	)	
Defendants	)	

JUDGMENT

This cause having come before the court on defendant's motion for summary judgment and the court having held a hearing on said motion on June 21, 1989,

and having considered the oral and written arguments of counsel, the pleadings, and the memoranda submitted by the parties, and the court having found no genuine issue as to any material fact, and that the defendants are entitled to a judgment as a matter of law, it is

ORDERED, ADJUDGED, AND DECREED that judgment is entered in favor of the defendants and against the plaintiff, and the motion for summary judgment is hereby GRANTED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BRIAN L. SMITH, Plaintiff vs. TOWN OF EATON, INDIANA TOWN BOARD OF EATON, INDIANA, AND ITS MEMBERS; RONALD HAGGARD AS BOARD MEMBER AND INDIVIDUALLY; DAVID WILLIAMS AS BOARD MEMBER AND INDIVIDUALLY; CHARLES HICKS AS BOARD MEMBER AND INDIVIDUALLY; DON MITCHELL AS BOARD MEMBER AND INDIVIDUALLY; JIMMY VANCE AS TOWN MARSHALL AND INDIVIDUALLY; AND DOES 1 THROUGH 5, Defendants	)	CAUSE NO. IP88-531C

NOTICE OF APPEAL

Comes now the plaintiff, Brian L. Smith, and submits the Notice of Appeal in the above entitled matter. The judgment of June 21, 1989, to the

Seventh Circuit

Thomas D. Margolis

Thomas D. Margolis

Attorney at Law

409 West Washington

Muncie, In 47305

317/ 288-0600

Certificate of service

I hereby certify the foregoing has been served upon the counsel for the defendants, David S. Wallace, 400 E. Jackson Street, Muncie, Indiana on the day of July,1989, by U.S. mail.

Thomas D. Margolis

Thomas D. Margolis

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

October 17, 1990.

Before

Hon. Richard D. Cudahy, Circuit Judge
Hon. Joel M. Flaum, Circuit Judge
Hon. Kenneth F. Ripple, Circuit Judge

BRIAN L. SMITH, Plaintiff	)	Appeal from the United States District Court, Southern District of Indiana, Indianapolis Division
NO. IP88-531C vs.	)	
TOWN OF EATON, INDIANA TOWN BOARD OF EATON, INDIANA, AND ITS MEMBERS; RONALD HAGGARD AS BOARD MEMBER AND INDIVIDUALLY; DAVID WILLIAMS AS BOARD MEMBER AND INDIVIDUALLY; CHARLES HICKS AS BOARD MEMBER AND INDIVIDUALLY; DON MITCHELL AS BOARD MEMBER AND INDIVIDUALLY; JIMMY VANCE AS TOWN MARSHALL AND INDIVIDUALLY; AND DOES 1 THROUGH 5, Defendants	)	No. 88 C 531 Sarah E. Barker, Judge.

Order

On consideration of the motion for clarification and petition for rehearing in the above-entitled cause filed by the plaintiff-appellant on September 4, 1990, all of the judges on the original panel have voted to deny the motion and the petition for a rehearing. Accordingly,

IT IS ORDERED that the aforesaid motion for clarification and petition for rehearing be, and the same is hereby, DENIED.

THE MUNCIE STAR, THURSDAY, MAY 5, 1988

TOWN BOARD TO MEET

EATON - The Eaton Town Board will meet at 8 a.m. today in an emergency executive session to discuss employee relations.

The Eaton town clerk said a special session which will be open to the public would follow at 8:30 a.m. in the town hall.

THE MUNCIE STAR, THURSDAY, APRIL 28, 1988

TOWN BOARD MEETING

EATON - The town board will meet at 6 p.m. May 4 in town hall - 600 E. Harris St.

EATON POLICE DEPT.
600 E. Harris St.
Eaton, Indiana 47338
Telephone 396-3297

December 18, 1987

Sub. Brian Smith Deputy Marshall Eaton Police Dept.
For Conduct Unbecoming An Officer.

After meetings and phone calls between myself and the police commissioner and several board members it was decided that Brian would forfeit all his days off for the months of Jan. and Feb. 1988 without any extra compensation.

Jimmy Vance
Town Marshall
Eaton Police Dept.

EATON POLICE DEPT.
110 North Hartford St.
Eaton, Indiana 47338
Telephone 396-3297

Sub. Brian Smith

Effective Fri. Feb. 19, 1988 for insubordination, disregarding a direct order from his superiors Brian Smith will be suspended from the Eaton Police Dept. for 10 working days without pay. This suspension ends Mar. 4, 1988. He is also relieved of all police powers for this time. While on suspension he will turn in his 2 deputy Marshal badges, his ID., his portable radio and charger, his keys to the police cars and office. This suspension was handed down by the Town Board at a special meeting held Sat. Feb. 13, 1988. He also no

operate the police radio in his personal car.

Aut. Town Marshal

Jimmie Vance

Auth. Police Comm.

David Williams

EMERGENCY SPECIAL SESSION May 5, 1988

The Town Board of Trustees of the Town of Eaton met in Emergency Special Session with John Penrod, Andy Cavanaugh and David Williams present. Jimmie Vance and Brian Smith were also in attendance.

John Penrod, President, called the meeting to order.

A situation that occurred the weekend of May 1 between Deputy Marshall Brian Smith and Phyllis Canter, owner of Lincoln Crest Apartments was discussed. John Penrod Suggested the Board wait until the Town attorney could be consulted concerning the situation and the Boards position on voting.

David moved Brian Smith be dismissed from the Eaton Police Department effective today, May 5, 1988. Andy seconded. Andy and David voted yes. John abstained. Smith was told by David Williams, Town Board member over the Police Dept. to turn in his things to Marshall Vance.

There being no further business to be brought before the Board, Andy moved and David seconded a motion to adjourn. Motion carried.

John R. Penrod,
President

Lois A. Haggard, Clerk-treasurer

State of Indiana)
)
County of Delaware)

Affidavit of Donald L. Withers

Comes now Donald L. Wither, being first duly sworn in the premises, says as follows:

1. That on Wednesday, February 10, 1988, I was at the Eaton Police Department, Eaton, Indiana.

2. That I am personally familiar with David Williams, the Police commissioner of Eaton, and was so on or about February 10, 1988.

3. That I spoke to David Williams on February 10, 1988.

4. That on that day, David Williams, spoke to me about a position on the Eaton Police Department.

5. That David Williams asked me if I would be interested in a full-time position on the Eaton Police Department on that day.

6. That David Williams was asked by me who was leaving the Eaton Police Department.

7. That David Williams stated that we're going to get rid of Brian Smith.

8. That David Williams, a few minutes earlier, had consulted in person with Andy Cavenaugh and Town Marshall Jimmie Vance in Marshall Vance's office at the Eaton Town Hall, Eaton, Indiana.

9. That David Williams instructed me to get an application for the Eaton Police Department, and that any problems with me living outside of the Town of Eaton would be dealt with.

10. That Marshall Jimmie Vance personally brought me in an application

for the Eaton Police Department on February 15, 1988 at 3309 N. New York Ave. Muncie,In..

affiant further sayeth not.

Donald L. Withers

Subscribed and swirn to before me the undersigned Notary Public on the day of November, 1989.

My Commission Expires: 12-26-92

Catherine Cooper,

Notary Public, resident of Delaware County, Indiana.